Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

In the Matter of the Visitation of AARON JACOB (FOLLUM) VIOLANTE AND MARIE ALYSSA (FOLLUM) VIOLANTE, Minors, WARREN R. FOLLUM SR.,

Petitioner,

v.

JOYCE ANN FOLLUM
a.k.a
JOYCE ANN VIOLANTE

Respondent.

On Petition For Writ Of Certiorari to the Court of Appeals State of New York

PETITION FOR WRIT OF CERTIORARI

WARREN R. FOLLUM, pro se
P.O.Box 5774
Raleigh, North Carolina, 27650
(919)-522-5689

QUESTIONS PRESENTED

1. New York permits grandparents under Domestic Relations Law § 72 to petition for court ordered visitation with their minor grandchildren - despite the parents' objections - only if after a full and fair evidentiary hearing on the grandparents' standing and the best interests of the minor grandchildren equity seems fit to intervene. Does imposing this two-prong test upon pro se litigants and their grandchildren violate the parties Due Process and Equal Protection rights to a fair and meaningful opportunity to be heard on the issues of standing and the best interests of the children where the pro se litigants are denied full disclosure by the New York courts and the parent(s) on all issues which are relevant and material to prosecuting and defending the State's imposed two-prong test? The New York Court of Appeals found that the lower courts' decisions did not offend the petitioner's and the children's rights to a full and fair hearing under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. This case presents the question of whether there is a statutory distinction under both New York's Civil Practice Laws and Rules (NYCPLR), and Domestic Relations Laws (NYDRL) between pro se litigants and litigants represented by counsel, and whether this distinction violates fundamental Fourteenth Amendment Due Process and Equal Protection Rights. The New York courts' erred when they denied petitioner and his grandchildren a full and fair opportunity to be heard.

A. Whether the Fourteenth Amendment Due Process and Equal Protection Clauses guarantees pro se litigants' and the children, who are the subjects of the litigation, to a full and fair hearing when the New York courts did not compel respondent to provide petitioner full disclosure on all issues that are relevant and material to the

prosecution and defense of this matter, under NYCPLR Article 31 Disclosure, and NYDRL ?

B. Whether , when the respondent's fitness is drawn into question, does the Fourteenth Amendment Due Process and Equal Protection Clauses guarantee petitioner the right to a full and fair hearing by having the New York courts compel respondent to submit to a physical and mental examination, under NYCPLR Article 31 Disclosure, NYDRL , and New York Family Court Act (NYFCA)?

C. Whether, when the parents' fitness is drawn into question, does the Fourteenth Amendment Due Process and Equal Protection Clauses require the New York courts to determine respondent's fitness, prior to the New York courts determining the petitioner's standing, and whether the grandchildren's best interests would be served by having visits with petitioner, under NYCPLR , NYDRL, and (NYFCA)?

D. Whether, when the parents' fitness is drawn into question, does the Fourteenth Amendment Due Process and Equal Protection Clauses guarantee petitioner's grandchildren the right to a full and fair hearing by having the New York court's or the children's Law Guardian bring the children before the New York courts to determine whether the children are in a safe and secure environment, and whether the children's Law Guardian is to interview the children and individuals who have daily contact with the children to determine whether they are in a safe and secure environment, under NYDRL, and NYFCA?

PARTIES TO THE PROCEEDING

The parties to this proceeding are set forth in the caption. The litigation concerns visitation with Aaron Jacob (Follum) Violante and Marie Alyssa (Follum) Violante, both minors.

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OPINIONS BELOW

The 22 November, 2005 opinion of the Court of Appeals of the State of New York in Case No. 1177 SSD 68 refusing to allow further appellate review of Appellate Court's affirmation of the Supreme Court, State New York, County of Monroe, decision, which is reported at 2005 N.Y. Lexis 3331, see page APP1. This petition for Writ of Certiorari is filed within ninety (90) days from that date, Supreme Court Rule 13. The 01 July, 2005, opinion of the Supreme Court Appellate Division Fourth Judicial Department, in Case No. CA - 04 - 01836 is reported at 20 AD.3d 886, see pages APP2-APP3. The Trial Court's Findings of Fact and Conclusion of Law of the Supreme Court of the State of New York, County of Monroe, Case No. 01 - 014496, is not official reported, see pages APP4 - APP16.

BASIS FOR JURISDICTION INTHIS COURT

The opinion of the Court of Appeals State of New York was issued on 22 November, 2005. The jurisdiction of this Court is invoked pursuant to 28 USC § 1257.

CONSITUTIONAL AND STAUTORY PROVISION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens, of the United States and of the State wherein they reside or where the lower court's proceedings were held. These citizens include both pro se litigants involved in a grandparent visitation proceeding under NYDRL § 72 and the children who are the real subjects to these proceedings. No State shall make or enforce or interrupt any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State unfairly or arbitrarily deprive any person of life, liberty or property, without Due Process of Law; nor arbitrarily deny to any of its citizens within its jurisdiction the Equal Protection of the Laws. Once the State provides a statutory right for full disclosure in a civil action under CPLR Article 31, and a grandparent the opportunity for visitation with his grandchildren under NYDRL § 72, the State can not

"bolt the door shut to equal justice", see Griffin v. Illinois, 351 U.S. 12. When the State does blocks petitioner's and the children's rights a full and fair opportunity to be heard, the State is violating his and the children's due process, and equal protection of the law rights under the 14th Amendment.

In New York, the only avenue open to petitioner to seek court ordered visitation with his grandchildren is though the two prong test delineated under NYDRL § 72. This statute requires petitioner to show, first, that he has formed an existing relationship with his grandchildren or that attempts to create one was frustrated by the children's parents, see Matter of Emanuel S. v. Joseph E., 78 NY.2d 178, before, the State court will determine whether visits by the children with petitioner are in the children best interests. What is required of petitioner when he was establishing a relationship with his grandchildren, shall always be measured against what he could reasonably have done under the circumstances, see Emanuel, supra; Matter of Agusta, 208 AD.2d 620, lv. dismissed 85 NY.2d 857.

The petitioner submits that the two-prong test enunciated in NYDRL § 72 impermissibly conditioned his and the children's due process rights to a fair hearing on the issue of whether there was an existing grandparent-child relationship, and the best interest of the children, by its implementation by the courts of New York denying petitioner and the children any real opportunity to be heard on the issues of standing and the best interests of the children. Forced to adduce evidence and proof of petitioner's standing and the best interests of the children, without full disclosure by respondent on all issues that are and were relevant and material to petitioner's prosecution and defense of the above two prong test when the New York court's and respondent blocked petitioner's efforts to full disclosure and an opportunity to a full and fair evidentiary hearing under NYDRL § 72. And respondent frustrated petitioner from establishing a relationship with his grandchildren; and thereafter when the children's parents' relationship deteriorated respondent immediately began to refuse any of

petitioner's efforts to contact his grandchildren. Petitioner could not possibly meet the first and second prongs of the standard imposed upon him by the proceedings conducted within the New York courts. In effect and as a practical matter, petitioner, and the children were prevented by the framework of the State court's proceedings and decisions from a fair opportunity to prove that visitation by the children with petitioner would be in the children's best interests, under the total facts and circumstances of this matter. The New York trial court blocked all of petitioner's clear statutory rights to obtain full disclosure from respondent. Petitioner and the children were denied their procedural due process rights by the New York courts in determining petitioner's standing, and what is in the best interests of the children. This Court has decided in numerous decision that procedural due process is absolute, because of the importance to organized society that procedural due process be observed. And the lack of "due process" invalidates the findings of the New York courts in this matter, in regards to petitioner's standing, and the children's best interests, see Carey v Piphus, 435 U.S. 247; Hughes v. Rowe, 449 U.S. 5; Stanley v. Illinois 405 U.S. 645; Matter of Lawrence 29 NY.2d 206; N.Y. v. Witenski 15 NY.2d 392; the Fourteenth Amendment of the Constitution of the United State; the New York Constitution, Article I §§ 6 and 11; Troxel v Granville, 530 U.S. 57; Bellotti v. Baird, 443 U.S. 622; Lassiter v D.S.S. Durham County, NC, 452 US 18; Matter of JoAnne Bennett 40 NY.2d 543; Matter of Ella B. 30 NY.2d 352; Von Moltke v Gillies, 332 US 708, 724.

A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner, see Lehr v. Robertson, 463 US 248, 268, quoting Mathews v. Eldridge, 424 US 319, 333; Armstrong v. Manzo, 380 US 545, 552. Because of the State courts' regime of denying respondent to comply with petitioner's requests for full disclosure, petitioner was precluded from the very outset from introducing any evidence, which would support and validate his assertion that, the children's mother was and is unfit, and that visitations by the children with petitioner would be in the children's best interests. Therefore, petitioner,

and the children have never been afforded any real opportunity in State court to prosecute and defend this matter in any meaningful manner, and thus has been denied due process and equal protection of the law.

Substantive due process comes not from drawing arbitrary lines, but rather from careful "respect for the teachings of history and solid recognition of the basic values that underlie our society, see Griswold v. Connecticut, 381 US 479; generally Ingraham v. Wright, 430 US 651; Joint Anti-Fascist Refugee Committee v. McGrath, 341 US 123; Lochner v. New York 198 US 45. Our society is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing an extended family along with the parents and children, has roots equally venerable and equally deserving of constitutional recognition. Over the years, millions of our children have grown up in just such extended families, and most, surely have profited from this extended family. Even if conditions of modern society have brought about a decline in the extended family, they have not erased the accumulated wisdom civilization has gained over the centuries and honored throughout our history, that supports a larger conception of family that especially includes grandparents. Either out of choice , necessary, or sense of family responsibility the extended family participates in the duties and the satisfaction of such a family. Especially in times of adversity , such as divorce or economic need, the broader extended family has tended to maintain or rebuild a safe and secure environment for the children. Petitioner's petition, like other grandparent's petitions for visitation, does not rest on an assertion of a fundamental right to visitation, but rather, rests on a combination of the best interests of the children, and family interests that is founded in our paramount interest in a child's welfare and our traditional recognition of both nuclear and extended families. Respondent, the children's mother, had consented to petitioner developing a relationship with his grandchildren, from the time of their births until the late fall of 2000, which respondent did in the best interest of the children. Since, the

children in this country are accorded a higher place on the pedestal of personal human rights than the parental control of the children , see Matter of Fitzpatrick, 186 Misc.2d 344, respondent may not terminate petitioner's visitation with his grandchildren without cause. The Court, assumes as it must, that the established petitioner - grandchild relationship, which respondent consented too, was in the best interest of the children. Thus when respondent subsequently seeks to terminate the petitioner -grandchild relationship, the State is not infringing upon respondent's right to determine who should have access to the children, but, rather, the State is making inquires to protect the children's best interests as determined by respondent, see Matter of VC v MJB, 748 A.2d 539; Matter of Younmans v Ramos, 711 NE.2d 165. The above combination of interests gives the State a compelling reason to provide the opportunity for petitioner and his grandchildren to keep a beneficial relationship with each other, despite some intrusion upon respondent.

Under New York law the courts recognizes that the "equity ground" for granting standing rests on the humanitarian concern that visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchildren, which cannot be derived from any other relationships, see Emanuel, supra. Although the New York Court of Appeals has failed to define the circumstances and conditions under which equity would see fit to intervene, to allow standing, it has instead chosen to give a broad interpretation to the clause, Emanuel, supra. An essential component of the standing inquiry is the nature and extent of the petitioner-grandchild relationship. Petitioner is required to establish a sufficient existing relationship with his grandchildren, or in cases where the relationship has been frustrated by respondent, as in this matter, a sufficient reasonable effort under the circumstances to establish one, so the court perceives the relationship as one deserving the court's intervention, see NYDRL § 72; Emanuel,supra; Agusta, supra.

In Emanuel, the New York Court of appeals, decided

that the grandparents had standing to seek visitation with their grandchild (Max) over the objections of the child's parents. The grandparent in Emanuel visited with Max during the first three months of his life, but were thereafter prevented from any further contact with him, when the grandparent's relationship with Max's parents deteriorated. Max's grandparents commenced their NYDRL § 72 petition a year after the parents obstructed the grandparents' visitation with Max. The New York highest court granted standing to Max's grandparents. Also, the New York Court of Appeals in Sibley v Sheppard, 54 NY.2d 320, held that a grandparent of a grandchild (Willie) who had an established relationship with Willie, whose father was in prison, and the grandchild had been adopted, had standing. The adoptive parents of Willie, objected to Willie's grandparents' request for visitation with Willie, and they obstructed the grandparents for six years from visiting with Willie, before the grandparents commenced an action to visit with Willie, under NYDRL § 72. Thus, under the New York Court precedent, petitioner, who has from the time of his grandchildren's birth, made a concerted effort to establish a relationship with his grandchildren by having dinner with them, sending them gifts, taken them on shopping trips, by calling them, by purchasing them the essentials of life, by visiting them on their birthdays, and holidays, and respondent has frustrated petitioner's efforts in establishing a relationship with the children, thus petitioner has established a sufficient existing relationship with his grandchildren for the Court to determine that petitioner has standing to seek visitation with his grandchildren.

Once, petitioner, has established standing the New York courts conducts further inquires into whether visitation by the grandchildren with petitioner are in the children's best interests. It has been recognized that in the New York courts there are no absolutes in making the best interests determination, but rather only policies designed to guide the New York courts in their determinations., see Eschbach v. Eschbach, 56 NY.2d 167; Friederwitzer v. Friederwitzer, 55 NY.2d 89. Although firmly entranced in New York law, the best interests of the child standard is subject to considerable

criticism due to its vagueness and subjectivity, and the best interests of the child is left to and reflects the values and moral biases of the preceding judge.

It is beyond dispute that the best interests of the children is the primary consideration in a grandparent's petition for visitation with his grandchildren, see Eschbach, supra; Emanuel, supra; Augusta, supra; Friederwitzer, supra; Matter of Davis, 240 AD.2d 928; Matter of King, 225 AD.2d 819, lv denied 88 NY.2d 806; see also NYDRL § 72; Many factors are to be taken into account by the New York courts when making its determination to the best interests of the children, and no one single factor, or combination of several factors, may take precedence. The New York courts must review all factors presented and consider the totality of the circumstances in rendering a decision, Friederwizer, supra; Gotham v. Gothham, 102 AD.2d 981. In fact, if the New York courts place too much weight on any one factor, to the exclusion of all other factors, the resultant decision will be reversed, see McIntosh v. McIntosh, 87 AD.2d 968; Saunders v. Saunders, 60 AD.2d 701. Factors to be used to determine whether visitation by the children with petitioner are in the children's best interest are the parties': physical and mental health; lifestyle; neglect, abuse or abandonment of the children by the parties; the parties relative economic status; the stability of the parties; home environment; whether the children are in safe and secure environment; and the parties ability to nurture the children, see NYDRL § 72; Friederwizer, supra; Eschbach, supra. Further, the services that the respondent used for caring for the children in her absence, would be germane to the children's welfare and best interests, see Matter of J. C. Morgan, 245 AD.2d 889.

One of the most important consideration in determining whether visitation by the grandchildren with their grandparent is in the children's best interests is the custodial parent's fitness, see Troxel, supra;Wilson v McGlinchey, 2 NY.3d 375; Aberbach v. Aberbach, 33NY.2d 592. Even though petitioner alleged that respondent was unfit, the New York courts made no attempt to determine

respondent fitness as a parent by either ordering a psychological examination of respondent, and the children; or allowing petitioner to bring respondent, and the children before a psychiatrist and / or psychologist for a mental health evaluation under NYCPLR § § 3121 and 3126.

Petitioner had a clear statutory right to the: children's home address; their telephone number; the children's and the mother's medical records; to have respondent and the children mental health evaluated; the name of the school the children attended, and their school records; the names of teachers who had daily contact with the children; any day care providers; after school activities the children participated in; the name and address of respondent's adult children, her siblings, and her ex-husbands; copies of the previous proceedings in New York Family Court, which involved the children and respondent; and a list of all expert witnesses that respondent would be calling to testify. Petitioner requested discovery, see pages APP17-APP38; and the New York court's denial to compel respondent to comply with petitioner's request for discovery is set out at pages APP39 - APP40. In addition to the above the lower court did not order a psychological examination, even though testimony was taken of respondent's erratic behavior, and this behavior was confirmed by Family Court orders which ordered respondent not to leave the children alone in the car as she shopped or leave the children alone in the bath tub as she cleaned the house; and to stop all other abusive behavior against the children by respondent. The trial court had the Family Court orders in its possession at the time of the hearing. Also, the trial court did not conduct an in camera interview; nor is there a psychological statement on the impact visitations with petitioner will have on the children. Another important factor in the above two prong test is that the New York appellate court's have found that a law guardian can not act effectively to protect the subject children in the course of a "fact-finding hearing" absence of meaningful communication with the children, who are the real subjects of the proceedings below, see Karl W. v Lillian W., 168 AD.2d 997; generally Matter of Orlando F., 40 NY.2d 103, 112. The law guardian did not

interview the children, school officials or anyone who had regular contact with the children; nor did the law guardian present evidence or place before the New York courts by independent means the children's desires, needs or concerns. Therefore, there is and was not a sound and substantial basis in the record in this matter, for the New York courts to make a determination on whether visitation by the children with petitioner is or was in the children's best interests, see NYDRL § 72, NYFCA § 251; Matter of C. D. Mix, 265 AD.2d 692; Matter of Thaxton, 222AD.2d 955, 958; McMahon v Thompson, 68 AD.2d 68, lv. denied 48 NY.2d 603; Matter of Nicotera, 222 AD.2d 892, 894; Matter of Buffin, 263 AD.2d 962; Mattter of Folsom, 262 AD.2d 875; Matter of Chaya S., 266 AD.2d 219; Matter of James Thomas, 277 AD.2d 935.

STATEMENT OF THE CASE

The petitioner brought this application to the Court, because of the uniqueness of the facts and circumstances of this case, and it creates issues of law that have overriding national importance to grandparents who proceed pro se in seeking visitation with their grandchildren , and to the grandchildren themselves; and to pro se litigants in general, on whether they will be afforded their fundamental and constitutional rights to a fair hearing and statutory guarantees under New York's Civil Practice Laws and Rules (CPLR), the Family Court Act (FCA), and Domestic Relation Law (DRL) § 72, which are afforded to litigants who are represented by counsel. Pro se litigants and their grandchildren can not be afforded a fair trial, when the New York Courts are biased against pro se litigants, and they are willing to turn the CPLR, FCA, and DRL § 72, on their heads.

I. The Decision below is in Fundamental Conflict with the Decisions of this Court and the Court of Appeals for the State of New York Recognizing that all Litigants are Entitled to Due Process and Equal Protection Under the Law when the State Conducts a Fact - Finding Hearing to Determine a Grandparent's Standing under DRL § 72 Petition, and Whether Visits by the Grandchildren with a Petitioner are in the Children's Best Interests.

As this Court knows, pro se litigants create unique problems for the courts. In recognition of this uniqueness the courts are obligated to construe the pro se pleadings and papers liberally. It is also well settled law, that the legal papers of a pro se litigant, however in-artfully pleaded and / or presented are held to less stringent standards than formal pleadings drafted by attorneys, see Haines v Kerner 404 US 519. It is well settled by this Court that litigation is not a game of skill in which one misstep by a party of the litigation is decisive to the outcome of the litigation. The Court has rejected this principle and accepted the principle that the purpose of the litigation is to facilitate a decision on the merits after full disclosure, see Maty v Grasselli Chemical Co., 303 U.S. 197; Conley v Gibson, 355 U.S. 41.

In the great run of pro se cases, the issues, are faintly articulated and often only dimly perceived. A grandparent acting pro se is even more likely to be unaware of controlling legal standards and practices, and unskilled in garnering relevant facts, it is difficult, if not impossible, to conclude that this matter has been adequately presented, when the trial court denied petitioner his clear statutory rights to full disclosure, see Betts v. Brady, 316 U.S. 455, 476. There is, therefore, a greater burden and a correlative greater responsibility upon the Courts to insure that statutory deprivations are redressed and that justice is done. This does not mean that the court assumes the role of advocate for the pro se litigant, but it does create a duty upon the court, to assist the pro se litigant and it directs the court to consider the papers on their merits, and to ensure that justice is done for all; see Burris v State Department of Public Welfare of S.C. 491 F.2d 762 (4th Cir.1974); Gordon v Leeke, 574 F.2d @ 1151 (4th Cir., 1978); Canty v City of Richmond,Va., Police Department 383 F.Supp 1396 (E.D. Va. 1974), affirmed, 526 F.2d 587 (4th Cir.,1975), cert. denied, 423 US 1062 (1976). Thus, the trial below was conducted in disregard of every principle of fairness and in total disregard for full disclosure, which is declared by New York law, and this Court as a requisite to a fair and impartial trial, see Betts, supra.

It is well settled by the New York Courts that visitation is a subset of custody and as such the lower courts are required to determine a request by a grandparent to have visitation with his grandchildren under the totality of the circumstances of each case and what is in the best interest of the children, see Bennett, supra; Matter of Gloria S. v Robert B., 80 AD.2d 72; Eschbaqch, supra; Friederwitzer , supra. The lower court may have been sympathetic towards respondent's plight, but the New York courts are commanded by law and by sound policy to resolve visitation disputes, not out of sympathy for the circumstances of the custodial parent, but out of concern for the best interests and welfare of the children at issue, see Obey vs. Degling, 37 NY.2d 768; Entwistle v. Entwistle 61 AD.2d 380, appl. Dsmd 44 NY.2d 851; Mouscarty v Mouscarty 63 AD.2d 973; Matter of Lincoln, 24 NY.2d 270, (1969); Matter of Finlay, 240 NY 429, (1925). The appointment of psychiatrists and psychologists in visitation matters has become such an integral part of the court's practice, that New York appellate courts have held that the failure to order independent psychiatric and / or psychological testing and evaluation of the parties whose mental health is in question constitutes an abuse of discretion, even when the need for such testing emerged in the middle of the trial, see Giraldo, 85 AD.2d 164; Zirinsky, 138 AD.2d 43.

There has been a long history in this matter of the trial court (Justice David D. Egan) denying the petitioner "Due Process and Equal Protection of the Law" under the Fourteenth Amendment of the Constitution of the United States, and the Constitution of the State of New York Article I §§ 6 and 11. The trial court dismissed the petitioner's first petition for visitation with his grandchildren without holding the necessary evidential hearing under NYDRL § 72; and the petitioner being aggrieved he appealed to the New York Appellate Division. The appellate court unanimously reversed the trial court order and remanded the matter to the trial court to hold a hearing under NYDRL § 72, see Follum v. Follum, 302 AD.2d 861. And the trial court consistently abused its discretion as a matter of law during the proceedings below; and that in view

of the trial court's abuse of its discretion as a matter of law to compel respondent to comply with full disclosure, the effect of the trial court's decision of the "Best Interests of the Children" was to deny the children, and petitioner their clearly fundamental and substantial Constitutional Rights to "Due Process and Equal Protection of Law"; and the children's Constitutional Rights to "Due Process and Equal Protection of Law" were further denied, because the law guardian did not provide the children with independent and effective representation of counsel. The only inference the Court can draw from the trial court's denial of petitioner's motions to compel respondent to comply with petitioner's demands for full disclosure is that the trial court was predisposed to deny petitioner's petition to visit his grandchildren.

In a separate matter, which is intertwined with the case at bar is the termination of the children's father parental rights. On 22 May 2002, Judge Egan terminated the children's father parental rights without providing the children's father notice of the hearing, even though the respondent's attorney knew that the children's father had executed an power of attorney with petitioner, while he was incarcerated. Under New York law, when a New York court terminates a parent's rights to his or her children the parent has a clear statutory right to a due process hearing , in which the court is required to make inquires into whether the children's father voluntarily signed an agreement; and the lower court must explain to the children's father the nature of the case, the statutory results of him terminating his parental rights to his children; and all other facts essential to a board understanding of the whole matter. The Court must explain to the children's father his rights to assigned counsel since he was and is indigent. Failure of the Court to inform him of his rights and that being indigent entitles him to assigned compensated counsel in regards to the custody infringements, violates his Fourteenth Amendment rights.

The children's father being aggrieved by Judge Egan's decision, appealed the termination of his parental rights to the Appellate Court Fourth Department, to vacate the trial court order. Petitioner is convinced and believes that the appeals

have a substantial basis and merit, and will result in reversal, because of many errors committed by the lower courts. A decision is expected by mid March. The lower court denied the children's father his Substantial Fundamental and Constitutional Rights to the custody of his children, when the lower court did not provide the children's father with his clear statutory right to assigned compensated counsel, pursuant Family Court Act § 262 (subd.(a), par.(V)), and the lower court did not hold a due process hearing to determine if he freely and voluntarily signed the agreement. Thus he was denied his constitutional rights under the 14th Amendment.

During the trial in this matter, respondent, the children's biological father and respondent's daughter (from a previous marriage) testified that respondent did not allow anyone to have overnight visitation with the children until January 2003, after the commencement of this action, and other than two of her adult daughters (from a previous marriage) respondent did not allow petitioner's grandchildren to visit with anyone without respondent being present during such visitations. Respondent testified that she continued to have regular contact with the children's father until August 2003, even though she had orders of protection against the children's father, not to have any contact with her. The children's father testified that he thought petitioner was abusive towards him, when he was a child, because; (1.) petitioner wanted to know who his friends were; and (2.) petitioner expected him to do his homework, and do well in school; and (3.) petitioner expected him to clean his room and put things away after using them; and (4.) petitioner set curfews, and when and where the children's father could go. Petitioner provided the trial court with a detailed visitation schedule in his memorandum of law. During a telephone conversation between petitioner and respondent in the fall of 2000, respondent told petitioner that he could not visit with or have any further contact with the children, because of her mental state and she could not deal with people including her family visiting with the children; and if petitioner did attempt to contact the children, respondent would make the children's father life absolutely miserable. After the above conversation

with respondent, petitioner called the children's father once a week to inquiry about his grandchildren, until the couple separated in the fall of 2001. Respondent admitted during cross-examination that she had not discussed her allegations of domestic violence or the children's father substance abuse problems with petitioner until after she terminated petitioner's rights to visit with his grandchildren; nor did she provide petitioner with her new telephone number or current address, which she kept secret from everyone., but her adult children. Respondent called a probation officer to testify concerning the children's father criminal history. The probation officer testified that the children's father has only two convictions; one for making a telephone call to respondent; and the second for trespassing at the couples home, after respondent called him to come to the house. Greece Town Court sentenced him to probation, but he was later sentenced to jail for violating his probation. The children's father was released from jail on 1 March 2004. Between early 2003 through the date of this petition respondent has not provided petitioner with her current address or telephone number, even after demanding this information from her attorney during petitioner's request for discovery. Because of the above, petitioner has not been able to communicate with his grandchildren since mid 2002. New York courts have always measured the grandparent's efforts to establish a relationship with his grandparent, against what the grandparent could reasonably have done under the circumstances, see Emanuel, supra; Agusta, supra. Therefore, because of the above, whether petitioner had overnight visits, or visited the children without respondent being present, or communicated with the children from mid 2002 to the present is not material and relevant to this matter.

Petitioner relocated to North Carolina after his job at Eastman Kodak Co., in Rochester, New York had been eliminated by a reduction in force. In its decision the trial court reasoned that visitation between the children and petitioner were not in their best interests. Because, petitioner had relocated to North Carolina; and the court further reasoned that petitioner's grandchildren were to young to

travel without their mother and visit petitioner in North Carolina for any extended period, even though petitioner testified, that he would travel with his grandchildren to and from North Carolina; or the petitioner would make arrangements to visit with his grandchildren in Western New York. NYDRL § 72 has no restrictions on where a grandparent resides to be granted visitation with his or her grandchildren.

The trial court could not determine the "Best Interests of the Children" without first resolving the respondent's fitness as a parent. The Court 's decision in Troxel, supra, made the fitness of the custodial parent(s) a touchstone issue in a third party visitation proceeding, when the custodial parent's fitness is drawn into question. The trial court has to address and decide the custodial parent's fitness prior to deciding petitioner's standing, and whether visitation by the children with petitioner are in their best interests. Failure of the trial court to resolve the fitness of the custodial parent before moving on to petitioner's standing and then best interests of the children, denied both the children, and petitioner due process.

The parties testimony, was plague with contradicting statements, regarding respondent's bizarre behavior, and that respondent is a manic-depressive, suffering from a bi-polar mental illness; and petitioner threaten to have the children removed from respondent's house, because of her mental state; and petitioner did not request to speak with the children during his numerous telephone conversations with the children's father; and petitioner has a controlling personality, and has been disruptive during visitation with the children. Petitioner's allegations regarding respondent's fitness is material, and a crucial issue in determining what is in the best interests of the children. The Thomas's court found that the above issues concerning the custodial parent , such as respondent, bizarre behavior and mental state were a critical issues in determining the custodial parent fitness, see Thomas J.D. v Catherine K.D.79 A.D.2d 1015. Even the most learned of the court's judges can not be expected to be experts in the

science of psychology, any more than skilled psychiatrists / psychologists can be considered to be expects in the law, see Fiore v Galang, 64 NY.2d 999; Recht v Teuscher, 176 AD.2d 863; Anonymous v Anonymous, 34 AD.2d 942. Neither respondent, nor the law guardian, nor the lower court was or is capable of determining the crucial issue of respondent's mental health without calling upon trained professionals to determine respondent's mental / emotional health and her fitness as a parent. Petitioner motioned the lower court prior to trial to compel respondent and the children to submit to an independent psychiatric and psychological evaluation. The lower court denied petitioner's motion. Petitioner renewed his motion to compel respondent to submit to a mental health evaluation during trial. The trial court again denied petitioner's motion. It would be a rare case that a trial court could reach a decision on whether visitation by the children with petitioner were in their best interests without first determining respondent's fitness as a parent.

CPLR § 3101 provides that: "There shall be full disclosure, by the parties, of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof." CPLR § 3121 (subd. [a]) provides "After the commencement of an action in which the mental or physical condition of a party is in controversy, any party may serve notice on another party to submit to a physical or mental examination by a designated physician". Also, CPLR § 3124 provides that: "If a person fails to respond to or comply with a request, notice, interrogatory, demand, question or order under this article, ..., the party seeking disclosure may move to compel compliance or a response". In visitation proceedings it is well settled law in New York that the parties mental or physical condition are brought into controversy and provides the parties with cause to seek a mental or physical examination of the other party, see Wilson, supra; Aberbach, supra ; Rosenblitt v Rosenbilt, 107 AD.2d 292; Schlagenhauf v Holder, 379 U.S. 104; Koump v. Smith, 25 NY.2d 287. Under New York law visitation is a subset of custody, and the mental health of the parties in a NYDRL § 72 visitation petition, is

germane to the best interest of the children standard, see Wilson, supra.

Discovery in New York practice is to be liberally construed to ascertain the truth, pursuant to the Civil Practice Laws and Rules, see Allen vs. Crowell-Collier Publishing, Co.,21 N.Y.2d 403 (1968). And in the broadest possible terms, discovery is to include discovery and inspection, physical and mental examinations, requests for admissions, and demands for addresses, in addition to depositions and examinations before trial. Broadly stated, the purpose of disclosure is to narrow the issues, to obtain evidence, and to secure information as to the existence of evidence that may be used at trial, ascertaining how and from whom it may be procured.

Respondent's attorney willfully and contemptuously failed to comply with petitioner's discovery notices and she was deliberately dilatory, evasive and obstructive with respect to petitioner's statutory rights to discovery, see discovery request pages APP17 - APP38. And respondent's actions were in a willful and contumacious manner intended to only frustrate and thwart the disclosure sought, so as to be prejudicial to providing petitioner with a full and fair opportunity to be heard in petitioner's cause of action for visitation with his grandchildren.

This matter was still in the pre-trial phase and petitioner had not filed a certificate of readiness, when petitioner on 20 September 2003, (which was 5 months before the fact finding hearing), filed a notice to the court requesting a pre-trial conference, that the trial court compel respondent to answer his interrogatories, and comply with full disclosure. Petitioner than filed three motions for discovery and two subpoenas, under CPLR §§ 3118, 3120, 3121,and 3124, with the trial court, to compel respondent to submit to an mental health examination to determine respondent's fitness as a parent. And to discovery the names and addresses of respondent's adult children; and any individual residing with respondent; and the name and

addresses of all day care centers / schools / after school functions that provided activities and control over the children; and the names of the teachers / instructors who oversaw the programs that the children were involved in. Petitioner also requested that respondent identify all her expert witnesses, and respondent provide a narrative of the subject matter each expert was to testify about; and that respondent provide the resume of each expert. The above is and was relevant, material and necessary to petitioner's prosecution and defense of his case. The trial court denied petitioner's motions of full discovery, see pages APP39 - APP40.

The purpose of petitioner's requests for discovery of the above individuals was so he could depose each of them before trial. Under New York practice, petitioner has an clear statutory right to exam any person before trial, upon ten days notice, and to exam his adversary upon all material issues of the case. This is no new principle of the New York discovery laws under CPLR. The right to pretrial discovery, has for over one hundred and thirty years been recognized by the Court of Appeals as an absolute right, see Jenkins v Putman, 106 NY 272; Sweeny v Sturgess 24 Hun 162; Tebo v Baker, 77 NY 33; Glenny v Stedwell, 64 NY 120. It is well settled law that discovery and other pretrial procedures established by New York Civil Practice Laws and Rules serves a vital role in the preparation of trial. The rules to disclose is a statutory requirement that all parties are entitled to. The intent of discovery is to narrow and clarify the basic issues and the disputed facts between the parties; and as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues; and to review the parties experts and evidence. Discovery can not be a doctrine that favors one class of litigants over another, see Schlagnhauf, supra. Pro se litigants have a clear statutory right to full disclosure as does litigants represented by counsel. Civil trials in the New York courts are no longer carried out in the dark, see Hickman v Taylor, 329 US 495; Conley v Gibson, 355 US 41; Allen, supra; Koump v Smith, 25

NY.2d 287; DiMichel v South Buffalo Railway Company, 80 NY.2d 184; Spectrum Sys. v Chemical Bank, 78 NY.2d 371.

During the February 2004, hearing before Judge Egan, respondent called two expert witnesses to testify. The first was Mr. Vattimo, a probation officer, and Ms Mazzotta, the director for Alternatives for Battered Women. Petitioner had requested in his request for disclosure that respondent, provide the names of each expert witness, his or her resume, and a brief narrative of the subject matter of the content and context of each experts testimony. Respondent refused to inform petitioner concerning her expert witnesses. Petitioner motioned the lower court to compel respondent to comply. The lower court denied petitioner's motion to compel respondent to comply with full disclosure. Respondent did not reveal her expert witnesses to petitioner until the day of the hearing. Both Ms Mazzotta, and Mr. Vattimo were subpoenaed, and brought with them records and documents. CPLR § 3120, requires that respondent serve petitioner a copy of the subpoena, and an opportunity to review, inspect, and copy the documents subpoenaed. Respondent never provided petitioner with a copy of the subpoena, and did not provide petitioner with notice to inspect the material. The lower court should not have allowed the experts to testify, because respondent's attorney willfully and contemptuously" failed to comply with petitioner's clear statutory right to discovery notices. At trial, petitioner objected to allowing respondent experts to testify during trial. Respondent actions were prejudicial to petitioner. Notice of the experts would have allowed petitioner to adequately prepare and cross examine them. Respondent's actions were in a willful and contumacious manner intended to only deny petitioner with a full and fair opportunity to be heard on his petition for visitation with his grandchildren. The trial court should have adjourned the proceedings when petitioner objected to respondent experts to testifying. The court is required by its rules, to provide petitioner an opportunity to depose the experts, and rebut the context of their testimony, see Thaxton, 222 AD.2d 955; Sauer 67 AD.2d 1082; Falkiides, 40 AD.2d 1074.

Under the doctrine set forth in Schlagenhauf, supra; Hickman , supra; Steinbrecher v. Wapnick, 24 NY.2d 354, civil trials no longer proceed in the dark; nor can the respondent pull a dark veil of secrecy over those facts and issues which are relevant, material, and non-privileged; nor can respondent refuse to disclosure information only to surprise petitioner at trial with this information.

After trial, petitioner discovered evidence which goes to the heart of his standing, respondent's fitness and the best interests of the children. Respondent testified at trial that she has surrounded her children with a loving and caring family, including her brother Robert. It has long been the law within the New York courts that an official document and / or court paper / judgment, even though it dehors the record, can be considered on appeal for the first time, even for modifying or reversing the order under review, see Crawford v. Merrill Lynch, 35 NY.2d 291, @ 298-299. Robert , a drug addict and convicted felon, who brutally caused the death of one Jimmy Amico over a pocket knife and six dollars, and than disposed the body in the New York Barge Canal, see People of the State of New York v. Robert Violante, 144 AD.2d 995, and Co-Defendent, People of the State of New York v. Gino Cobos, 85 AD.2d 893. During the proceedings below, Robert, was paroled from prison, and resided with the parties mother Lena Violante. Robert spent almost twenty-three years in jail. During trial respondent testified that she allowed the children to have numerous overnight visits and weekly visits with her mother, and Robert . These actions by respondent goes to the respondent fitness, and that these actions are not in the children's best interest. If the trial court had not abused its discretion as a matter of law, petitioner would have been able to provide evidence that he had standing, that respondent is an unfit parent, and that visitation by the children with petitioner was and is in their best interests. Respondent's denial to allow petitioner to have visitations with the children was not done in the children's best interests, but rather it was self serving and involved personal issues between respondent and petitioner.

As summarized here, under the "totality of the circumstances" rule, no one factor, is determinative in making an award of visitation. Determining what is in the "best interests of the children" requires that consideration be given all factors, see Matter of Freiderwitzer, supra; Matter of Nehra, 43 NY.2d 242. The factors to be considered: (1). The relative stability of the grandparent; (2). The morality of the grandparent; (3). The prospective educational opportunities the grandparent can offer the children; (4). The developmental opportunities the grandparent can provide the children; (5). The educational background of the grandparent; (6). The financial standing of the grandparent; (7). The atmosphere and environment of the grandparent's home; (8). The grandparent's past conduct with his own children; (9). The ability and availability of the grandparent to spend time with the children; (10). The wishes of the children; and (11). The Court of Appeals in Emanual, supra held that animosity between the adults, either unilateral or bilateral is not a proper yardstick or reason to deny a grandparent visitation with his grandchild, or a basis for terminating visitation, because it has no bearing on the child's emotional and /or physical well being. Layton v Foster, 61 NY.2d 747; Matter of Lo Presti 40 NY.2d 522; Apker v Malchak, 112 AD.2d 518; Johansen, 95 AD.2d 973; Vacula v Blume, 53 AD.2d 633.

Petitioner emerged as a well disposed, educated, knowledgeable and productive citizen, who is a Associate Director at a prestigious North Carolina University setting, and whose visitations with his grandchildren were accepted by respondent for three-and-a-half years with unmurmuring acceptance. North Carolina State University is the flagship university within the University of North Carolina system. There is not the faintest intimation that the visits between petitioner, and his grandchildren were other than beneficial towards the children's best interest. Further, the petitioner has been most generous in his support or offers of support to his grandchildren. Petitioner love and affection for his grandchildren are shown by the distances he has been willing to travel in order to see then; 160 mile round trip when

petitioner resided in New York, and 1800 mile round trip now that he resides in North Carolina. And indeed, this proceeding is further earnest proof of petitioner's genius feelings. Petitioner's right to visit with his grandchildren is thus established, see Matter of Anonymous, 34 AD.2d 942.

The day has long past in this country, if it had ever been, when the right of a parent to the control of his or her children, would be enforced, contrary to the best interest of the children, on the theory of an absolute legal right. Instead, where there is conflict, the best interest of the children has always been regarded as pre-eminent to the right of parental control. There has been a shifting of emphasis that reflects a more modern principle that children are people, and not a sub-person over whom the parent has an absolute possessory interest. Constitutional rights do not mature and come into existence magically only when one attains the state-defined age of majority. It has been firmly established that children are persons within the meaning of the Constitution and accordingly process constitutional rights, see Planned Parenthood v Danforth, 428 US 52. Precisely defining these rights has not been an easy task. But, children have an interest in the outcome of a fact finding hearing, such as would be required in a NYDRL § 72, independent of the parent, see Santosky v Kramer, 455 US 745. A child has rights, some of which are of a constitutional magnitude, see Goss v Lopez, 419 US 565; Matter of Winship, 397 US 358; Tinker v Des Moines School Dist., 393 US 503; Matter of Gault, 387 US 1; Baird, supra.

In reaching its conclusion in this matter the New York trial and appellate courts relied to heavily on the children's father's alleged problems, without adequately examining the children, respondent, or petitioner. Most importantly, there was no psychological or other background examination of respondent and her live-in boyfriend. Nor was there any psychological statement on the impact visitations by the children with petitioner will have on them; nor did the New York trial court conduct an in camera interview of the children; nor did the law guardian interview or have any

meaningful communication with the children either before or during the fact-finding hearing, which in of itself is reason to reverse the lower court's decision in this matter. There was, therefore, no consideration on whether the children are in a safe and secure environment, or whether the children are adequately cared for; nor was there consideration of whether respondent is an adequate parent, in capacity, motivation, and planning. Nevertheless the New York courts determined that visitation by the children with petitioner would not be in their best interest. Thus, a new hearing is required, see Bennett, supra, because the New York trial court did not thoroughly examine the qualifications and background of the parties involved; and it relied to heavily on the children's father's alleged problems in making its decision, which in of itself is reason to reverse the lower court's decision; also petitioner made it clear to the court that the children's father would not be involved in any visitation between the children and petitioner, if the trial court so ordered; and the trial court was excessive in applying abstract principles and speculation in its decision. Therefore, petitioner and the children were denied due process, and equal protection of the law, under the 14th Amendment, and the Court should reverse the lower court's decision, and remand the matter to the New York courts for a new trial by a different judge after there is full disclosure to provide petitioner and the children a full and fair opportunity to be heard on petitioner's visitation petition under NYDRL § 72.

II. The Decision below is in Fundamental Conflict with the Decisions of this Court and the Court of Appeals for the State of New York Recognizing that the Grandchildren Who are the Real Litigants to These Proceedings are Entitled to Due Process and Equal Protection Under the Law when the State Conducts a Fact-Finding Hearing to Determine a Grandparent's Standing, and Whether Visits by the Grandchildren with the Petitioner are in the Children's Best Interests, under DRL § 72 Petition.

Under New York's DRL § 72, once a grandparent petitions the courts for a order to visit with his or her

grandchildren, the State is required to conduct a judicial fact-finding hearing to determine the grandparent's standing, and whether visitation by the children with the grandparent is in the best interest of the children, see Follum, supra. It is well settled that the children in these matters are the wards of the court, and the court must look to the children's welfare and their rights before all else. The children's best interest is paramount to respondent's control of her children. A judicial hearing is required, and due process of law commands the New York trial courts to conduct an inquiry, that carefully probes the children's background using all available sources, including, but not limited to, the parent, the grandparent, the children's school teachers and officials; and conduct a mental health evaluation of the parties if their mental health is drawn into question; and the court must carefully interview the children, determine whether they are in a safe and secure environment, see Parham v J.R., 442 US 584. In the facts of the case at bar, the New York trial court did not conduct a hearing that complied with the above due process requirements. It has been firmly established that children are persons within the meaning of the constitution and accordingly possess constitutional rights, and in a fact finding hearing the children's rights are independent of the parents. Thus, since the New York courts nor did the law guardian comply with the statutory framework determined by New York law, and legal standards, petitioner's grandchildren were denied their constitutional guaranteed rights to due process and equal protection of the law.

Our adversarial process in a NYDRL § 72 proceeding provides the parent, the children who are the real subjects to the proceedings, and the grandparent the opportunity to demonstrate to the court whether visitations by the children with the grandparent are in the children's best interests. This is especially true for the grandparent and his grandchildren, since they both have to demonstrate the best interest standard over the objections of a hostile parent. Both petitioner , and his grandchildren can not demonstrate that visitation by the grandchildren with petitioner are in the children's best interests, unless there is full disclosure and the

children's law guardian is independent of any influence from the adult parties and the trial court. And the children's interest in the outcome of this fact finding hearing is independent of the parent, the grandparent, and the trial court, see Santosky, supra. The statutory framework of NYDRL § 72, provides the children with the statutory right to submit evidence, cross examine witnesses, and request full disclosure under CPLR Article 31, and they have a clear statutory right to a full and fair opportunity to be heard, thus mandating that the petitioner's grandchildren have 14th Amendment rights, as commanded by New York State law.

In a proceeding under NYDRL § 72, numerous factors combine to magnify the risk of erroneous fact finding. Such proceedings employ imprecise substantive standards that leave determinations open to the subjective values of the presiding judge. In appraising the nature and quality of a complex series of encounters among the children, parent and the grandparent, the trial court possesses unusual discretion to under-weigh probative facts that favor petitioner, because such proceedings are vulnerable to the judge's cultural and family biases. The lower courts are required to determine a request by a grandparent to have visitation with his grandchildren under the totality of the circumstances of each case and what is in the best interest of the children, see Bennett, supra; Matter of Gloria S. v Robert B., 80 AD.2d 72; Eschbaqch, supra; Friederwitzer, supra.The lower court may have been sympathetic towards respondent's plight, but the New York courts are commanded by law and by sound policy to resolve visitation disputes, not out of sympathy for the circumstances of the custodial parent, but out of concern for the best interests and welfare of the children at issue, see Obey, supra; Entwistle, supra; Mouscarty v Mouscarty, 63 AD.2d 973; Matter of Lincoln, 24 NY.2d 270, (1960); Matter of Finlay, 240 NY 429, (1925). For example, the New York court discounted actual visits and communication between the children and petitioner as insignificant, infrequent, and that no bond existed between the children and petitioner. The trial court simply under-weighed the extent and quality of the visits between petitioner, and his grandchildren. New York

law, and sound court policy commands that the standing issue, and best interest standard is always measured against what petitioner coul'd reasonably have done under the circumstances, see Emanuel, supra; Agusta,, supra.

Public trust in the judicial process, demands that appointments of a law guardian by a judge must be fair, impartial and beyond reproach, see Preamble to Part 36 of the Rules of Chief Judge Kaye (22 NYCRR). The Court appointed law guardian for children, has to be guided by the children's best interest, to ensure that the children interests are expressed to the Court and to protect the children's fundamental rights to due process and equal protection of the law. The law guardian can not effectively represent the children without first meeting with the children in their home to determine whether the children are in fact residing in a save and secure environment. And to meet with the children's school officials and physicians to determine whether the children suffer from any psychological and/or physiological problem(s). This is especially true in the instant matter, when petitioner questioned respondent's fitness as a parent . The law guardian is to confer with the children, see Matter of Jasmine, 88 AD.2d 996. Failure of the law guardian to have a meaningful dialog with children prior to or during the fact-finding hearing would deny the children a full and fair opportunity to be heard. The children's law guardian did not have any communication with the children prior to or during the fact finding hearing under NYDRL § 72; nor did the law guardian conduct an investigation into the children's home or school environment; nor did the law guardian call independent witnesses to facilitate a sound and reasonable decision by the trial court.

Under New York statutes the minor children's fundamental rights to due process and equal protection of the law in a grandparent visitation partition is the responsibility of the children's law guardian. NYDRL § 72, gives a minor child the right to demonstrate, that they are either mature enough to make their wishes known to the court or that the child's attorney will make their wishes known to the court

independent of either the parent or grandparent. For the law guardian to provide independent representation of the children there has to be meaningful communication with the children; and by calling independent witnesses; and completing an independent investigation of the children's home, and school environment, and effectively cross-examining the parties called to testify during the hearing. And when, as in this matter, there is allegations of custodial parent unfitness, and misconduct towards the children, the law guardian is bound to request that the trial court order a mental health evaluation of the parent in question. Failure of the law guardian to fully represent the children in accordance with the above would constitute dereliction of duty and that the law guardian's representation of the children was incompetent; and deny the children their fundamental right to be heard, under the Fourteenth Amendment

The law guardian who represented the children in this matter also represented the children in the divorce proceedings between respondent, and their father. The previous divorce litigation between respondent, and the children's father is independent of the instant case. The law guardian's representation of the children in both matters creates a conflict of interest between the law guardian and children. There is also the personal bond between respondent and law guardian that was created by the previous litigation. It is immaterial whether the law guardian had an actual or perceived relationship with respondent, because just the appearance of bias towards either respondent or petitioner is sufficient reason for the law guardian to recuse himself from the grandparent visitation proceedings, see Matter of Apel, 96 Misc.2d 839; Matter of Davis, 269 AD.2d 82; Fargnoli v Faber, 105 AD.2d 523, appeal dismissed 65 NY.2d 783; McKinney's Cons Laws of NY, Book 29A; NYF CA § 249.

There is a long standing precept in the legal profession that an attorney is duty bound to pursue his client's interests diligently and vigorously within the limits of the law, see Code of Professional Responsibility, Canon 7. For the law guardian to perform his statutory duties in the instant matter,

the law guardian can not have a prior litigation relationship with the children and /or either adult when the previous litigation was not a continuation of the instant case, see Matter of Fargnoli, supra. The matrimonial / custody action between respondent and the children's father, and petitioner's NYDRL § 72 petition are separate and distinct actions, with respondent and the children being parties in both actions. In light of the above and the statutory function of the law guardian to give the children, who are the real subjects of these court proceedings, absolute independent and impartial representation, which is untainted from previous litigation, the law guardian should have been recused; and the court should have appointed a law guardian who had not been involved in previous custody litigation between respondent, the children and their father. The children were denied their fundamental right to independent representation.

It would be a extraordinary situation prior to trial, if the law guardian, had not formed a prior opinion regarding the best interest of the children in this grandparent visitation dispute, when he was involved in and fully participated in eight separate and distinct matrimonial and custody hearings that involved the same children, but did not involve both the same adults, see Matter of Stien, 130 Misc.2d 609. The law guardian's involvement in the previous litigation made the law guardian pre-disposed in his opinion in the instant matter.

One of the touchstone provisions of a New York grandparent visitation proceedings is for the law guardian to help the children express their wishes to the court. The law guardian can not fully represent the children unless he has meaningful communication with each child and seeks out the fullest presentation and truth of the facts concerning the allegations from both respondent and petitioner, and the law guardian is duty bound to report to the trial court the children's present home and school environment, so that the trial court can make a reasoned and informed decision on whether visitation by the children with petitioner are in the children's best interests, see Family Court Act § 241; Ohio v

Akron Center for Reproductive Health, 497 US 502; Matter of Davis , 269 AD.2d 82. The law guardian in the instant matter did not interview the children to determine their desires, so their opinions could be expressed to the Court.

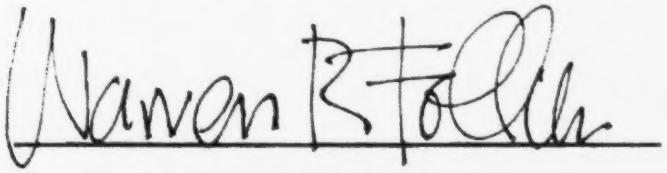
The law guardian, is charged with the responsibility to conduct investigations to determine the truth of the alleged allegations by both the custodial parent and the grandparent, see Mattter of Braiman, 44 NY.2d 584, (1978); Barry v. Ingraham, 43 NY.2d 87. Primary among the circumstances to be considered is the quality of the home, and school environment and the parental guidance the custodial parent provides the child, see Matter of Eschbach, supra. With testimony by the children's father concerning alleged child abuse by the respondent, which both the trial court and the law guardian knew of, because they both had the Family Court orders in their possession, which ordered respondent to stop all abusive behavior against the children. The law guardian was duty bound by the trial court's original order assigning him as the children's law guardian, to visit the children at home; and obtain their school and medical records; and depose the children's teachers, neighbors, respondent and respondent's live-in boyfriend. New York's statutory framework, and the fact that the law guardian knew of respondent's abusive, and bizarre behavior, required the law guardian to do some independent investigation to determine the children's best interests. Also, no evaluation was performed to determine the possible impact of the proposed visitation would have on the children, Matter of Ciulla 255 AD.2d 580. The law guardian, could not determine the best interests of the children without performing the above. Because, of the above, the children were denied due process and equal protection of the law, under the Fourteenth Amendment. Therefore, the Court should reverse the lower court's decision, and remand the matter to the New York courts for a new trial, by a different judge, and assign a different law guardian, after there is full disclosure to provide petitioner and the children a full and fair opportunity to be heard on petitioner's visitation petition under NYDRL § 72.

CONCLUSION

For all the foregoing reasons, petitioner Warren R. Follum, Sr., respectfully prays that a Writ of Certiorari be issued to review the decision of the New York Court of Appeals denying further appellate review of the judgment and opinion below; and, ultimately, a new order should be issued vacating and reversing the judgment, and remanding the matter to the Supreme Court of the State of New York, County of Monroe for a new trial, before a different judge, and assign a different law guardian; so that petitioner can adduce proof through full disclosure on all the issues that are relevant and material to petitioner's visitation petition; so that petitioner and the children are provided with a full and fair opportunity to be heard on New York's two prong test to determine whether visitation by the children with petitioner are in the children's best interests, such that the lower courts will grant petitioner reasonable visitation with his grandchildren; and for such other relief as is fair and just in the circumstances of this case.

Dated: 20 February 2006

Respectfully submitted,



Warren R. Follum, Sr., Pro se
P.O. Box 5774
Raleigh, North Carolina 27650
919 - 522 - 5689

COURT OF APPEALS OF NEW YORK

MOTION NO. 1177 SSD 68

WARREN R. FOLLUM SR., *Appellant*

v.

JOYCE ANN FOLLUM,
a.k.a., JOYCE ANN VIOLANTE, *Respondent*

2005 N.Y., LEXIS 3331

22 November 2005, Decided

NOTICE THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Follum v. Follum, 20 AD.3d 886, 797 NYS.2d 331, N.Y. App. Div. 4th Dept., 2005

OPINION: Appeal dismissed wihout costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

PRESENT: Hon. Judith S. Kaye, Chief Judge presiding.

SUPREME COURT OF NEW YORK,
APPELLATE DIVISION,
FOURTH DEPARTMENT

CA 04 - 01836

WARREN R. FOLLUM SR., *Appellant*

v.

JOYCE ANN FOLLUM,
a.k.a., JOYCE ANN VIOLANTE, *Respondent*

20 A.D. 3d 886

1 July 2005, Decided
1 July 2005, Entered

SUBSEQUENT HISTORY: Appeal dismissed by Follum v Follum, 2005 NY LEXIS 3331, NY 22 November 2005.

PRIOR HISTORY: Appeal from an order of the Supreme Court, Monroe County (David D. Egan, J.), entered 14 May 2004. The order dismissed the petition, by which the petitioner sought visitation with his grandchildren. Follum v. Follum, 302 AD.2d 861, 755 NYS.2d 145, N.Y. App. Div. Fourth Dept., 2003

COUNSEL: WARREN R. FOLLUM, SR., PETITIONER – APPELLATE PRO SE.

NIXON PEABODY LLP, ROCHESTER, MARGARET A. CLEMENS OF COUNSEL, FOR RESPONDENT

WILLIAM H. KING, JR., LAW GUARDIAN, FOR JACOB F. AND ALYSSA F.

JUDGES PRESENT: SCUDDER, J.P., KEHOE, SMITH, PINE AND HAYES, JJ.

OPINION: MEMORANDUM AND ORDER

It is hereby ORDERED that the order so appealed from be and the same hereby is unanimously affirmed, without costs.

Memorandum: Supreme Court properly dismissed the petition, by which petitioner sought visitation with his grandchildren (see generally Domestic Relations Law § 72[1]; Matter of Emanual S. v Joseph E. , 78 NY.2d 178, 181 - 183, 577 NE.2d 27, 573 NYS.2d 36) over the objections of respondent, the children's mother. The evidence adduced at the hearing on the petition established that there is no existing relationship between the children and petitioner, their paternal grandfather, and that there is deep animosity between petitioner and respondent (see Matter of Eggleton v Clark, 11 AD.3d 459, 460 - 461, 782 NYS.2d 771; Matter of Ziarno v Ziarno, 285 AD.2d 793, 794 - 796, 726 NYS.2d 820, lv denied 97 NY.2d 605, 762 NE.2d 931, 737 NYS.2d 53; Matter of Wenskoski v Wenskoski, 266 AD.2d 762, 763 - 764, 699 NYS.2d 150; see also Matter of Wilson v McGlinchey, 2 NY.3d 375, 381 - 382, 811 NE.2d 526, 779 NYS.2d 199). We have considered petitioner's remaining contentions and conclude that they are without merit.

STATE OF NEW YORK,
SUPREME COURT COUNTY OF MONROE

INDEX NO. 2001 - 014496
APPELLATE DIVISION
DOCKET NO. CA02-00844

WARREN R. FOLLUM SR., *Petitioner*

v.

JOYCE ANN FOLLUM,
a.k.a., JOYCE ANN VIOLANTE, *Respondent*

HONORABLE DAVID D. EGAN
SUPREME COURT JUSTICE

The above entitled matter having been duly brought on by Order to Show Cause, dated 12 December 2001, with attached affidavit, filed by petitioner Warren Richard Follum, pursuant to Domestic Relations Law § 72 (hereinafter "DRL"), for an Order awarding him grandparent visitation with his minor biological grandchildren, Jacob (age 6) and Alyssa (age 5); and the respondent Joyce Ann Follum, the children's biological mother and sole custodial parent, having opposed the motion; and petitioner having appeared pro se; and respondent having been represented at the request of Volunteer Legal Services Project, by Nixon Peabody, LLP, Margaret A. Clemens, Esq., of counsel, and the Court having assigned William King, Esq., as law guardian for the infant children, and the Court having held a hearing on February 23, 24, and 25, 2004; and having heard evidence submitted by the parties and having had due deliberation thereon; and upon all prior pleadings and proceedings,

Now, the Court finds as follows:

FINDINGS OF FACT

1. Respondent Joyce Ann Follum is the mother and sole custodial parent of Jacob (age 6) and Alyssa (age 5).

2. The children's biological father Warren R. Follum, Jr., whose parental rights were terminated during a divorce proceeding by Judgment of this Court entered in May 2002.

3. Petitioner is the biological parental grandfather of Jacob and Alyssa, and he is seeking grandparent visitation. He currently works and resides in North Carolina.

4. Respondent Joyce Ann Follum was properly served with the Order to Show Cause and supporting affidavit and has opposed such grandparent visit.

5. This Court has jurisdiction of this matter pursuant to *DRL § 72.*

6. Petitioner has alleged, among other things, that he has standing to seek visitation and that visitation would be in the children's best interest. He seeks to have the children travel to see him during summer or at holidays for some periods of time at his home in Raleigh, North Carolina. He has, however, made no request for specific time, nor has he provided the Court with any information on his planned arrangements. He has not sought to communicate with the children by telephone or by mail, nor did he seek to visit them here in the Rochester, New York area. His explanation for his inability to do so is devoid of specificity. In his last conversation by telephone in June, 2000 with the respondent, petitioner did not inquire of the children's welfare despite the recitation of violence and abuse relayed by respondent concerning petitioner's son, Warren Follum, Jr. In the "couple" subsequent calls to the residence after this occasion, petitioner did not request to speak to respondent

or with the subject grandchildren.

7. Respondent has objected to visitation by the grandparent on several grounds, including that petitioner has had no meaningful or existing relationship with Jacob and Alyssa, and it would not be in their best interest to commence a relationship now.

8. Petitioner does, and has, lived out-of-state in Raleigh, North Carolina. Prior to his move to North Carolina , petitioner visited with the children approximately once a month, or less, from the time they were first born. Such visits typically occurred at family functions such as their baptisms, Thanksgiving and Christmas. Beginning in April 1997, petitioner purchased items (including baby furniture) for the minor grandchildren Jacob in anticipation of his birth on 20 June 1997. These items included, but not limited to furniture, clothing and newborn essentials. Prior to the year 2000, petitioner continued to occasionally purchase clothing and other sundry items for both grandchildren.

9. After moving to North Carolina in about early 2000, petitioner visited with the children when he traveled to the Rochester area, less than 12 times a year, for about a one-year period time, at which time visitation ceased. The last time petitioner saw the children was in 2000, when Jacob was approximately 3 or 4 years old and Alyssa was age 2, (petitioner did have regular phone contact with the father of the children, Warren Follum, Jr., and the topic on each occasion, at least in part, regarded the grandchildren, but petitioner never spoke with to either grandchild from 2000 until the present). Petitioner has never been alone or on a one on one basis. The children do not ask for him or demonstrate that they remember him. At such visits and holidays the petitioner often took photographs but interacted little with the subject minor grandchildren. At no time has the petitioner visited with the grandchildren

without the parents and at no time has the subject minor grandchildren visited with the petitioner overnight.

10. This Court finds that the petitioner grandparent's contact with the children, Jacob and Alyssa was infrequent ; he had seen Jacob up to 12 times a year for less than a four year period of time from the respective child's birth and generally these contacts occurred at a family get together. Petitioner has seen Alyssa even less frequently, and his visitations with her ceased when she was approximately age 2. At the time of the respective births of the grandchildren, the petitioner was residing in the county of Niagara, State of New York and would visit them, at most, approximately every four to six weeks with each visit being approximately four to six hours per visit which results in, at most, seventy eight (78) hours of contact per year with the minor children. Petitioner's visits included visits at some holidays, shopping trips to the mall or shopping center and dinner at a restaurant, with very few visits occurring at the residence of the grandchildren. Such evidence is insufficient to establish that the grandparent has or had a close, nurturing relationship with the children. The testimony and documentary evidence introduced at trial is void of any demonstration of a bond between grandparent and child, in fact the petitioner was not struck by any emotion when discussing his relationship with the grandchildren, but rather described their relationship as "fine" and for the most part spoke to the children rather than engaging in activities.

11. Further, the respondent (the custodial parent) has objected to the visitation, because, among other things, the grandparent had a controlling personality and his behavior towards the mother over the years has strained the family relationship. The respondent, as mother of the subject grandchildren, has severed any relationship that may have existed between petitioner grandparent and grandchildren due to the reasonable and rational perception that the

petitioner has and will enable his son, the father of the children, to have contact with the subject minor grandchildren and has not come to appreciate the gravity of the situation between the respondent and his son, including domestic violence, criminal acts and use of alcohol and drugs.

12. This is a case where there has been a long history of domestic violence by petitioner's son towards the children's mother, respondent Joyce Follum, which abuse commenced in 1996, when respondent's son Jacob was a few months old. During testimony of the respondent, the domestic violence between the respondent and her former spouse, Warren Follum, Jr., was explained in great detail, yet the petitioner did not (and still does not) know whether to believe the respondent's testimony since the testimony of his son was contrary, which demonstrates that the petitioner does not appreciate the gravity of the situation between the respondent and her former spouse as it affects the safety and welfare of the subject minor grandchildren. While animosity between the parties, standing alone, might be an insufficient basis on which to deny visitation, petitioner's failure to apprehend the gravity of his son's behavior demonstrates a lack of understanding militating against visitation with the children. If permitted visitation, it is entirely possible that petitioner could similarly fail to appreciate real threats and dangers to the subject children.

13. Respondent sought help through Alternatives for Battered Women ("ABW") and obtained Orders for Protection from Family Court and from Greece Town Court.

14. Petitioner's son continued to violate Orders of Protection issued by Greece Town Court and continued to harass respondent until approximately August 2003, at which time he pleaded guilty to aggravated harassment and criminal contempt and was sentenced to one year in jail; he

is presently serving time in the Monroe County Jail for these offenses and is expected to be released this summer.

15. Further, petitioner's son Warren Follum, Jr., (or, "Rick" as petitioner refers to him) admittedly abused illegal drugs, including cocaine, for nearly twenty years; he further admits that he has on occasion sold drugs, although he later attempted to qualify the "drugs" he sold as alcohol when he was bartending. The petitioner is presently aware, and has been aware since the time material to this petition of the fact that his son (the respondent's former spouse) had "a problem" with alcohol and illegal drugs and assisted him in obtaining treatment. Petitioner is also aware of criminal matters that his son had in New York State which all revolved around aggravated harassment and the violation of orders of protection involving his son and respondent. Petitioner is and was aware that all of these incidents involved allegations that his son committed offenses against respondent and the courts. Petitioner is Also aware of his son's violation of probation, however the extent of his awareness is not entirely clear.

16. During his testimony at the hearing, petitioner's son conceded that he wrote a letter indicating that his behavior towards respondent was influenced by his own father's abusive behavior towards him when he was young. Petitioner's son further admitted that petitioner did not hug him or otherwise demonstrate any affection towards him when he was growing up, but, rather, provided for him materially.

17. On at least one occasion, while on probation, petitioner's son has violated his probation and has fled the court's jurisdiction to reside temporarily with petitioner.

18. Petitioner admitted to taking his son in petitioner's own car to his home in North Carolina. This occurred when petitioner's son was on probation and was not allowed to

leave the County without permission – which he did not have on this occasion. Although petitioner's son admitted to fleeing the jurisdiction in violation of his probation when petitioner drove him to North Carolina, petitioner denied knowledge of the fact that his son was violating his probation by leaving the jurisdiction.

19. During the time period, petitioner has taken the side of his son as opposed to respondent and chose not to believe respondent's claims of the son's drug abuse or domestic violence. Petitioner's behavior in this regard was evident during a taped telephone call placed by petitioner's son in approximately 2000 to respondent, during which telephone call petitioner asked respondent for his son's tools, but never inquired about, offered to aid, or expressed concern for the grandchildren he seeks to visit. Such omission was particularly noticeable given information respondent provided about his son's behavior and her need for help.

20. During the hearing in this matter, petitioner again chose to continue to believe his son's version of the event, refused to concede at all that respondent has been the victim of several incidents of violence and abuse at the son's hands and he stated that he did not believe respondent. Petitioner attempted to establish the punitive unfitness of respondent during the proceedings before this Court which demonstrates that he continues to minimalize his son's behaviors making any future contacts with the grandchildren to be potentially harmful to them. If allowed visitation, it is entirely conceivable that despite the documented drug and physical abuse of his son, petitioner may well seek to influence the grandchildren's relationship with their mother by insinuating his son's version of the fitness of respondent into conversations and the like. This scenario would be harmful to the children.

21. Respondent has taken reasonable steps to protect

herself and her two minor children from continuing incidents of domestic violence, including obtaining a divorce, terminating the biological father's parental rights, changing her name and the children's name, and keeping her location and that of the children secret from the biological father and petitioner because she believes that they pose a threat to the children's safety and well-being.

22. Respondent has acted, and continues to act, in the children's best interest throughout very difficult times and much family dysfunction by placing the children's welfare and safety first.

23. Respondent has also been the primary caretaker of Jacob and Alyssa and she has surrounded them with people who love and support them. Such individuals include two biological grandparents, five adult children, and other relatives. The children are in school, participate in school activities, go to an after school program, socialize with friends and have a normal life.

24. Despite knowledge of his son's harmful behavior towards respondent and her children, petitioner has and continues to support his son and has failed to express appropriate concern for respondent or the children at issue. He has also ceased any financial assistance whatsoever.

25. Petitioner has in the past threatened to take the children away from their mother, and he repeatedly degraded and made unfounded accusations about respondent even to this Court.

26. Petitioner offered no proof to support his allegations in the affidavit he submitted in support of his order to show cause that the mother suffers from any diagnosable mental illness such as obsessive compulsive disorder or manic depression and is therefore unfit; indeed, such allegations

appear to be based upon unsupported information petitioner received from his son.

27. Similarly, petitioner offered no credible evidence to support his claims that respondent isolated the children from anyone other than herself because "she could not deal with people interacting with either herself or her children" *(Respondent's Affidavit, ¶ 7).*

28. Indeed, the credible evidence is to the contrary. Respondent and the children socialize and have meaningful relationships with other family members, including the father's biological mother and her husband after remarriage, both of whom reside in Florida, respondent's own mother, the children's five older siblings from respondent's previous marriage, as well as various aunts and cousins.

29. Petitioner has demonstrated a deep-animosity towards respondent and a strong desire to have his son resume parental contact or visitation with his biological children. The Court notes that petitioner's demeanor during his testimony was hostile in tone and gesture, that his responses were vague and evasive and that he consistently engaged in recrimination and argued with counsel.

CONCLUSION OF LAW

1. This Court has personal jurisdiction over the respondent through personal service of the Order to Show Cause in the State of New York.

2. This Court has subject matter jurisdiction over the issues involved herein through the New York Domestic Relations Law § 72.

3. New York State is the proper venue as the respondent and the subject children resided here at the time of the commencement of the action and the respondent and the

children have been parties in a number of New York State Family Court proceedings and New York State Supreme Court action of divorce.

4. The determination of grandparent visitation is a two-step inquiry. (*see DRL § 72*). The threshold question to be decided is petitioner standing. Section 72 of the Domestic Relations Law provides certain grandparents with standing to seek visitation with their grandchildren. *DRL § 72 (McKinney's Cons Laws of New York)*. There is no automatic

standing for a grandparent seeking visitation. *In Matter of Emanuel S., 78 NY.2d 178 (1991).*

5. At common law, grandparents had no standing to assert rights of visitation against a custodial parent. *(Id.) (citing LoPresti v LoPresti, 40 NY.2d 522, 526-27 (1976).* Rather, standing is permitted only where one parent is deceased or "where circumstances show that conditions exist which equity would see fit to intervene."

6. This provision of the Domestic Relations Law rests upon a humanitarian concern that visits with a grandparent are often a precious part of a child's experience and that there are benefits which confer upon the grandchild which he cannot derive from another source. Id. When a grandparent seeks visitation under this provision, the court must first find that the grandparent has sufficient standing which would permit the Court to entertain the petition. It is only if the grandparent has such standing, or right to be heard, that a court must determine if visitation is in the best interests of the children.

7. To establish that he has the requisite standing, petitioner in this case must prove that he has a sufficient existing relationship with the grandchildren, or in a case where that has been frustrated by the parents, *a sufficient effort to establish one* so that the court perceives it as one

deserving the court's intervention. Where a grandparent has done nothing to foster a relationship or to demonstrate their attachment to the grandchildren, despite opportunities to do so, they will be unable to establish that conditions exist where equity would see fit to intervene. *In Matter of Rose Hickey, 307 AD 356 (2d Dept. 2003; In the Matter of Barbara Horowitz, 300 AD.2d 659 (2d Dept. 2002).*

8. Petitioner has not met this legal standard. It is not sufficient for a grandparent to merely allege love and affection for a grandchild. The grandparent also has to establish a sufficient existing relationship with the grandchild or a sufficient effort to establish one. Where the parent's fitness is not questioned, interference with that parent's right to limit those whom his or her child associates is only justified by some compelling state purpose which furthers the child's best interest. *Matter of Ziarno v Ziarno, 285 AD.2d 793 (3rd Dept. 2001).*

9. Like the grandparent in *Ziarno,* petitioner in this case has never had a sufficient relationship with Jacob and Alyssa to have standing to seek visitation. At most, he demonstrated that he had infrequent contacts at family gatherings when they were infants and / or toddlers. Although petitioner claimed that these contacts were close and affectionate, the greater weight of the credible evidence showed that his contact with the children was of a passive nature, such as his sitting alone at family gathers and merely observing, but not interacting, with the children. Petitioner also took numerous photographs of these events. Neither child knows or remembers him. Petitioner lives outside of the state and the children are too young to travel without their mother and visit him in North Carolina for any extended period of time. Petitioner voluntarily relocated himself out of state thus distancing himself from the children even further. Since respondent cut petitioner's contact with the household off (after petitioner showed no

concern for his son's violence and drug abuse), petitioner has failed to make a sufficient effort to maintain contact with the grandchildren. Petitioner's explanation for this flagging effort rings hollow. What little efforts petitioner has made are grounded more in a concern on his part to rehabilitate his embattled son's reputation than in a genuine concern for the well being of the children.

10. Even if petitioner could establish the requisite standing, the petition must be dismissed. It is well established that the primary consideration in a case involving grandparent visitation is the best interests of the child. *Matter of Emanuel S v Joseph e, 78 NY.2d at 181; Wilson v McGlinchey, 305 AD.2d 879 (3rd Dept. 2003).* This Court finds that it would not be in the best interests of the children to permit visitation. More to the point, equity does not see fit to have this Court to intervene in this stable parent / child relationship.

11. Circumstances, such as the animosity between the parties, coupled with an obvious dysfunction in the family, mitigate against an award of visitation to a petitioner grandparent. *Wilson v McGlinchey, 305 AD.2d 879 (3rd Dept. 2003; Matter of DiBernardino, 229 AD.2d 539 (2d Dept. 1996).*No compelling state interest would be served by permitting visitation in this case. The record well establishes that petitioner and respondent share a mutual enmity. It would not be in the best interests of the children to be in the midst of this overt hostility.

12. Under the circumstances in this case, it would be harmful to the children to permit the visitation, particularly since it is likely that the adults will continue to be incapable of preventing these feelings from infecting the visitation and exposing the children to stress, tension and hostility which will cause the children to suffer emotionally. *Id.* This fact is made more apparent when one considers that the issue of

petitioner's son, whose parental rights were terminated by this Court, will continue to be bandied about by the parties to the detriment of the children. Simply put, petitioner has to come to grips with the reality of his son's emotionally destructive behaviors toward respondent, and by extension, toward the children. Even as late as respondent's submissions to the Court on this petition, he has continued to split hairs about his son's behaviors in the face of his son's pleas of guilty to offenses involving respondent and his admission of drug abuse.

13. It is simply not in the best interests of the children for this grandparent to have visitation. Further, minimal visits taking place in an artificial setting absent any real life, nurturing experiences would not establish a meaningful relationship with the children. *Matter of Doolittle, 304 AD.2d 828 (2d dept. 2003).* Petitioner has not heretofore shown the subject children the kind of affection for which equity would now see fit to intervene. Petitioner's ability to show his own immediate family members love and affection has been called into question even by his own son via letters he wrote to respondent while he was in substance abuse treatment. Under these circumstances, visitation would amount to an empty gesture devoid of any meaningful benefit to the children.

14. Accordingly, the petition is dismissed.

This Decision shall constitute the Order of the Court.

DATED: Rochester, New York
13 May 2004

"s/ David D. Egan"

HON. DAVID D. EGAN
SUPREME COURT JUSTICE

STATE OF NEW YORK,
SUPREME COURT COUNTY OF MONROE

RESPONDENT'S RESPONSE TO PETITIONER'S DISCOVERY and INSPECTION REQUEST

INDEX NO. 2001 - 014496
APPELLATE DIVISION
DOCKET NO. CA02-00844

WARREN R. FOLLUM SR., *Petitioner*

v.

JOYCE ANN FOLLUM,
a.k.a., JOYCE ANN VIOLANTE, *Respondent*

HONORABLE DAVID D. EGAN
SUPREME COURT JUSTICE

Respondent, **JOYCE ANN FOLLUM**, through her attorneys, Nixon Peabody LLP, by and for her Response to Petitioner's Discovery Requests, responds as follows: such

Request No. 1:

The Defendant is to furnish the following information:

a. The Defendant's full legal name and current address where she presently resides?
b. Current telephone number?
c. Date of birth?
d. Your maiden (family) name?
e. Your last name from all marriages?
f. Your present and any past social security numbers?
g. Name and ages of your children?

h. Name and ages of your children who reside with you and name and ages of any other person who resides with you?
i. Provide your current mailing address?

Response No. 1:

Respondent objects to this request on several grounds, including: (1). That the request is overly broad, unduly burdensome, and seeks unnecessary and immaterial information to the issues for the hearing; (2) is invasive, seeks confidential and personal information and is designed solely to harass respondent; (3) the information is purportedly sought to enforce a judgment[1] , however, such judgment was improperly obtained and is in the process of being vacated; and (4) petitioner already knows that portion of the information sought which is relevant.

Request No. 2:

The Defendant is to furnish the following information:
a. The Defendant's previous address(s) where you resided for the past seven years?
b. Any alias or assumed name(s) that you have used in the past seven years?

Response No. 2: **see Response No. 1**

Request No. 3:

3. The Defendant is to furnish the following information:
a. The name and address of the child care center(s) that Jacob and Alyssa attend when you are at work?
b. The child care center(s)'s current telephone number?

---

[1] The respondent petitioned the trial court and the appellate court to have the judgment vacated, both courts denied the respondent's petition.

c. The days and times that the children attend the child care center(s)?
d. Is the child care center certified by the State of New York and/or County of Monroe to care for children?
e. The name of the person(s) who are certified by the State of New York and/or County of Monroe to care for children?
f. The type of activities that the child care center provides to the children to help them develop both their social and educational needs and skills?
g. Provide a short narrative describing the overall environment of the facility and the precautions that the center provides to ensure the safety of each child?
h. Has the child care center been cited for any violation(s) and are there any law suits pending in any Court within the County of Monroe and/or New York that involves the child care center(s)?
i. What type of meals and/or snacks do the children receive at the child care center?

Response No. 3: **see Response No. 1**

Request No. 4:

The Defendant is to furnish the following information:

a. The name(s), address(s) and age(s) of all individual(s) who provide child care services for the defendant when she is at work to care for Jacob and Alyssa.
b. The child care provider(s)'s current telephone number?
c. The days and times that the children are cared for by the above individual(s)?
d. The address(s) where the child care provider(s) renders the child care service(s)?

e. Are the above individual certified by the State of New York and/or County of Monroe to care for children?
f. The type of activities that the child care provider(s) provides to the children to develop both their social and educational needs and skills?
g. Provide a short narrative describing the overall environment of the facility where the children are cared for and precautions that the provider provides to ensure the safety of the children?
h. Has any of the child care provider(s) been convicted of a crime other than a minor traffic offense?
i. Has or do any of the child care providers use illegal drugs?
j. Has any of the child care providers admitted to and/or been diagnosed with an addiction to illegal drugs, prescription drugs and/or alcohol?
k. Provide a narrative in your opinion on whether or not each child care provider is willing, able, capable and competent to care for Jacob and Alyssa?
l. What type of meals and/or snacks do the children receive at the child care center?

Response No. 4: **see Response No. 1**

Request No. 5:

The Defendant is to identify each person whom the defendant expects to call as a witness at the hearing / trial of this action and disclose in reasonable detail the subject matter on which each witness is expected to testify, the substance of the facts on which each witness is expected to testify?

Response No. 5:

Respondent expects to testify at trial as to the lack of a relationship between petitioner and her children, as well as why it

is not in the children's interests to have visitation with petitioner. She will also testify in response to any and all allegations made by petitioner.

Respondent also intends to call such other and further witnesses as may be necessary to respond to allegations made by petitioner. Respondent is unable to make determinations precisely who will be able to testify given that petitioner has not testified or disclosed in any reasonable detail what he will testify to under oath. Respondent expects that such witnesses may include one or more of her adult children, as well as the grandmother of the two youngest children and/or one of the children's daycare providers.

Request No. 6:

> The Defendant is to identify each piece of evidence that the defendant expects to submit at the hearing / trial of this action and disclose in reasonable detail the relevance of the evidence to this action, the person from whom the evidence was obtained and the manner and date the evidence was obtained?

Response No. 6: **see Response No. 5.** Respondent has not yet determined precisely which evidence (in addition to Response No. 5) she intends to offer at trial, but it will include her own testimony.

Request No. 7:

> The Defendant is to identify each affidavit that the defendant expects to enter /submit at the hearing / trail of this action and disclose in reasonable detail the relevance of the affidavit to this action, the person from whom the affidavit was obtained and the manner and date the affidavit was obtained?

Response No. 7: Affidavits are not permitted to be submitted at a hearing.

Request No. 8:

> The Defendant is to identify each person whom the defendant expects to call as an expert witness at the hearing / trial of this action and disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each witness is expected to testify and a summary of the grounds for each expert's opinions?

Response No. 8: At this time respondent does not expect to call an expert witness.

Request No. 9:

> On 14 May 2003 the Defendant stated in Court that she would be unable to attend the hearing on the 15th of May, because Alyssa had an appointment with a specialist. The Defendant is to furnish the following information:
>
> a. Provide the name(s) and address(s) of the specialist that examined Alyssa.
> b. Provide the specialist's current telephone number?
> c. The reason(s) for the visit to the specialist?
> d. The diagnosis that the specialist provided regarding Alyssa symptoms and/or condition(s).
> e. The reason(s) the specialist gave for Alyssa symptoms and / or conditions?
> f. Any medication, therapy and / or activities that specialist prescribed that will reduce and / or eliminate Alyssa symptoms and / or conditions?

Response No. 9: **see Response No. 1.**

Request No. 10:

> The Defendant is to furnish the following information:
>
> a. The name and address of the doctor(s) and / or midwife who provided the prenatal care during the

pregnancy of Jacob and Alyssa ?

b. The doctor(s)'s and / or midwife(s)'s current telephone number?

Response No. 10: **see Response No. 1.**

Request No. 11:

The Defendant is to furnish the information within the Court Order dated 14 May 2003.

Response No. 11: To the extent respondent has such documents, they are enclosed.

Request No. 12:

The Defendant is to furnish the following information:

a. The full legal name and current residential address of the Defendant's ex-husband prior to the Defendant's ex-husband Warren R. Follum, Jr.?
b. Current business and home telephone number(s)?

Response No. 12: **see Response No. 1.**

Request No. 13:

The Defendant / attorney for the Defendant is to furnish the following information:

a. All verbal and written communications with the Chambers of the Honorable David D. Egan?
b. Provide a copy of all written communications with the Chambers of the Honorable David D. Egan and all decisions reached and/or agreements made?
c. Provide a narrative fully explaining all verbal conversations with the Chambers of the Hon. David D. Egan? The narrative is to provide the purpose of the verbal communications, the issues discussed, the date and time of the communications and any decisions reached and / or agreements made?

Response No. 13: Other than notification by Nixon Peabody LLP that it was representing respondent, none.

Request No. 14:

What do you pay monthly for the following expenses?

a. Rent? Landlord's name, address and telephone number?
b. Mortgage? Lender's name, address and telephone number?
c. Gas?
d. Electric?
e. Food?
f. Clothing?
g. Child care?
h. Medical?
i. Transportation and lunches?
j. Home Insurance?
k. Water?
l. Real estate taxes?
m. Vehicle (Auto and / or Truck) Insurance
n. Other (list each item separately)?

Response No. 14: **see Response No. 1.**

Request No. 15:

Are you employed?

a. Name and current address of current and last employer?
b. Current telephone number of your current and last employer?
c. Date of employment?
d. Earnings?
e. Type of work performed?
f. Badge and / or employee identification number?

Response No. 15: **see Response No. 1.**

Request No. 16:

Are you self employed or do you have a business or do you have a connection with a business and / or firm?

a. Name business?
b. Stock ownership?
c. Trade name?
d. DBA name?
e. Partnership name and names and addresses of other partners?
f. Address(s)?

Response No. 16: **see Response No. 1.**

Request No. 17:

State the particulars of the employment and / or business of all other members of your household?

Response No. 17: **see Response No. 1.**

Request No. 18:

Do you receive a pension or are you entitled to receive a pension from a previous husband? State the earliest date you can receive the pension?

Response No. 18: **see Response No. 1.**

Request No. 19:

Do you receive disability payments of any kind, contributions to your support or the support of your family, or any other form of income?

Response No. 19: **see Response No. 1.**

Request No. 20:

Have you in the past six years or do have or own any of the following; And state the value of each the following?

a. Bank or savings account?
b. Safe deposit box?
c. Life insurance?
d. Stocks, bonds or other securities?
e. Real estate?
f. Judgments?
g. Monetary settlement received from the Town of Greece?
h. Property either real or personal and / or cash received from previous matrimonial settlements?
i. Mortgages on real and / or personal property?
j. An automobile and / or truck?
k. Pawn tickets?
l. IRA and / or 401k?
m. A note, draft or other in which an individual and / or business owes you money?
n. Give particulars of the above item and any liens thereon?

Response No. 20: **see Response No. 1.**

Request No. 21:

Have you in the last six years applied for or obtained a loan from a bank, finance company, or other person or institution? Give Particulars.

Response No. 21: **see Response No. 1.**

Request No. 22:

Have you been a co-maker, endorser, or guarantor of any loan or installment purchase in the past six years?.

Response No. 22: **see Response No. 1.**

Request No. 23:

What money other than salary have you received in the last six years?

Response No. 23: **see Response No. 1.**

Request No. 24:

Are you acting as executor, administrator, trustee, receiver, guardian under a power of attorney, or in any other such capacity?

Response No. 24: **see Response No. 1.**

Request No. 25:

Have you inherited any money and / or property?

Response No. 25: **see Response No. 1.**

Request No. 26:

Are you a beneficiary of any trust?

Response No. 26: **see Response No. 1.**

Request No. 27:

27. Are you a beneficiary of any pension plan?

Response No. 27: **see Response No. 1.**

Request No. 28:

28. What is the vehicle identification number of your automobile and / or truck?

Response No. 28: **see Response No. 1.**

Request No. 29:

29. Where is your automobile and / or truck normally parked and / or stored?

Response No. 29: **see Response No. 1.**

Dated: August 21 2003.

NIXON PEABODY LLP

"s/ Margaret A. Clemens, Esq."

Margaret A. Clemens, Esq.
Clinton Square
P.O. Box 31051
Rochester, New York 14603-1051
(T): 585 - 263 - 1000

To: Warren R. Follum, Sr., Pro Se
PO Box 5774
Raleigh, North Carolina 27650
(T): 919-522-5689

STATE OF NEW YORK,
SUPREME COURT COUNTY OF MONROE

ORDER TO SHOW CAUSE

INDEX NO. 2001 - 014496
APPELLATE DIVISION
DOCKET NO. CA02-00844

WARREN R. FOLLUM SR., *Petitioner*

v.

JOYCE ANN FOLLUM,
a.k.a., JOYCE ANN VIOLANTE, *Respondent*

HONORABLE DAVID D. EGAN
SUPREME COURT JUSTICE

On the annexed affidavit[1] of Warren R. Follum Sr., sworn to on the 14th day of January, 2004, and upon all other papers and exhibits herein, let the respondent show cause at Visitation Rights Hearing of the Supreme Court, pursuant *New York Domestic Relation Law § 72* to be held in the Hall of Justice, Rochester, New York, on the _____day of _____ 20_____, at _____o'clock in the _____ of said day, or as soon thereafter that the parties can be heard why an Order should not be made pursuant to *New York Civil Practice Law & Rules, Article 31, Disclosure § 3121,* requiring the respondent Joyce Ann Follum and her two minor children Jacob and Alyssa to submit to an independent psychological evaluation before Dr. Susan Horowitz, to determine the fitness of Joyce Ann Follum to make decisions concerning the care, custody, and control of her children.

[1] The affidavit is not included.

And whether the respondent's mental state has had an adverse affect on the social and emotional development of her minor children Jacob and Alyssa. And that a guardian ad litem be appointed to participate in determining Jacob's and Alyssa's best interest. And why the petitioner should not have such other and further relief as may be just.

And that the independent psychological evaluation be scheduled at a convenient time for the parties and it shall be scheduled during Dr. Horowitz's normal business hours. The hearing regarding the petitioner's standing for visitation under *New York Domestic Relation Law § 72* shall occur a minimum of thirty (30) days after the completion of the independent psychological evaluation.

And that the above hearing be heard with the hearing to compel respondent to comply with CPLR Article 31, Disclosure.

And, sufficient reason existing thereof, let service of this Order and the affidavits upon which same is made, on the _____ day of _____, 20_____, be deemed sufficient service thereof.

Date: _____

JUDGE DAVID D. EGAN
JUSTICE OF THE SUPREME COURT

STATE OF NEW YORK,
SUPREME COURT COUNTY OF MONROE

ORDER TO SHOW CAUSE

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JOYCE ANN FOLLUM,
a.k.a., JOYCE ANN VIOLANTE, *Respondent*

HONORABLE DAVID D. EGAN
SUPREME COURT JUSTICE

On the annexed affidavit[1] of Warren R. Follum Sr., sworn to on the 14th day of January, 2004, and upon all other papers and exhibits herein, let the respondent show cause at Visitation Rights Hearing of the Supreme Court, pursuant to *"New York Domestic Relation Law § 72"* to be held in the Hall of Justice, Rochester, New York, on the _____day of _____ 20_____, at _____ o'clock in the _____ of said day, or as soon thereafter that the parties can be heard why an Order should not be made pursuant to *New York Civil Practice Law & Rules, Article 31, Disclosure § 3124 Failure to Disclose; Compel Disclosure and Article 52, Enforcement of Money Judgments,* compelling the respondent Joyce Ann Follum to fully answer each question in the request for disclosure that was served upon the respondent in the

[1] The affidavit is not included.

forenoon of the 15th day of July 2003. And why the petitioner should not have such other and further relief as may be just.

And the respondent return the answers together with the original of the questions within ten (10) days after the respondent receives the questions.

And that the above hearing be heard with the hearing to compel the respondent to submit to a independent psychological evaluation by Dr. Susan Horowitz.

And, sufficient reason existing thereof, let service of this Order and the affidavits upon which same is made, on the _____ day of _____, 20_____, be deemed sufficient service thereof.

Date: _____

_____

JUDGE DAVID D. EGAN
JUSTICE OF THE SUPREME COURT

STATE OF NEW YORK,
SUPREME COURT COUNTY OF MONROE

ORDER TO SHOW CAUSE

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APPELLATE DIVISION
DOCKET NO. CA02-00844

WARREN R. FOLLUM SR., *Petitioner*

v.

JOYCE ANN FOLLUM,
a.k.a., JOYCE ANN VIOLANTE, *Respondent*

HONORABLE DAVID D. EGAN
SUPREME COURT JUSTICE

On the annexed affidavit[1] of Warren R. Follum Sr., sworn to on the 24th day of January, 2004, and upon all other papers and exhibits herein, let the Monroe County Access Officer, the Monroe County Sheriff Patrick O'Flynn, the Monroe County Attorney DeLaus and the respondent show cause at Visitation Rights Hearing of the Supreme Court, pursuant to *"New York Domestic Relation Law § 72"* to be held in the Hall of Justice, Rochester, New York, on the _____day of _____ 2004, at _____o'clock in the _____ of said day, or as soon thereafter that the parties can be heard why an Order should not be made pursuant to the *Freedom of Information Law (FOIL) and New York Civil Practice Law & Rules, Article 31, Disclosure §§ 3101, 3120 and 3124 Failure to Disclose; Compel Disclosure,* compelling the Monroe County Access Officer,

[1] The affidavit is not included.

Monroe County Sheriff P. O'Flynn and Monroe County Attorney DeLaus to comply with the petitioner's freedom of information request under FOIL and the petitioner's request for disclosure. And why the petitioner should not have such other and further relief as may be just.

And the answers together with the original of the questions are to be returned within ten (10) days after the Court's Order.

And that the above hearing be heard in conjunction with the petitioner's "Orders to Show Cause" that were submitted to this honorable Court on 14 January 2004, and 24 January 2004.

And, sufficient reason existing thereof, let service of this Order and the affidavits upon which same is made, on the _____ day of _____, 2004, be deemed sufficient service thereof.

Date: _____

JUDGE DAVID D. EGAN
JUSTICE OF THE SUPREME COURT

STATE OF NEW YORK,
SUPREME COURT COUNTY OF MONROE

SUBPOENA DUCES TECUM

INDEX NO. 2001 - 014496
APPELLATE DIVISION
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v.

JOYCE ANN FOLLUM,
a.k.a., JOYCE ANN VIOLANTE, *Respondent*

HONORABLE DAVID D. EGAN
SUPREME COURT JUSTICE

To: Dr. Richard Urban, MD
1283 Portland Avenue
Rochester, New York 14621-2728
(T) 585-544-5880

GREETINGS:

YOU ARE HEREBY COMMANDED to appear and attend before the Honorable David D. Egan, a justice of the Supreme Court County of Monroe at a Special Term, Part _____, of the Supreme Court, to be held in the Hall of Justice, Rochester, New York, on the _____day of _____ 2004, at _____ o'clock in the _____ of said day, or as soon thereafter that the parties can be heard and at any recessed or adjourned date thereof, to testify and give evidence in the above entitled action now pending in that Court between the above-mentioned parties. And twenty-one days prior to

the trial date you are to deliver to Justice Egan's Clerk in a sealed envelope, clearing showing the title of the action, the date fixed for production, the name and address of the petitioner as it appears below and the records contained within the envelope, the following:

You are hereby commanded to provide a full size copy of all medical records relating to the care and treatment of Joyce Ann Follum, and the names of any doctors who you referred Joyce Ann Follum to, while she was a patient of yours during the period of January 1990 to February 2004, now in your custody or control, and all other writings which you have in your custody concerning the above premises; and for a failure to attend you will deemed guilty of contempt of court and liable for all damages sustained to the party aggrieved thereby and to forfeit $50 in addition thereto.

The above records shall be available 14 days prior to trial for the petitioner's for inspection and copying of the medical records provided.

Date: _____

JUDGE DAVID D. EGAN
JUSTICE OF THE SUPREME COURT

Petitioner: Warren R. Follum, Sr.
P.O.Box 5774
Raleigh, N. C. 27650
919-522-5689

STATE OF NEW YORK,
SUPREME COURT COUNTY OF MONROE

SUBPOENA DUCES TECUM

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JOYCE ANN FOLLUM,
a.k.a., JOYCE ANN VIOLANTE, *Respondent*

HONORABLE DAVID D. EGAN
SUPREME COURT JUSTICE

To: Dr. Peter VanBrunt, MD
1445 Portland Avenue, Ste. 302
Rochester, New York 14621-3008
(T) 585-544-1120

GREETINGS:

YOU ARE HEREBY COMMANDED to appear and attend before the Honorable David D. Egan, a justice of the Supreme Court County of Monroe at a Special Term, Part _____, of the Supreme Court, to be held in the Hall of Justice, Rochester, New York, on the _____day of _____ 2004, at _____ o'clock in the _____ of said day, or as soon thereafter that the parties can be heard and at any recessed or adjourned date thereof, to testify and give evidence in the above entitled action now pending in that Court between the above-mentioned parties. And twenty-one days prior to

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The above records shall be available 14 days prior to trial for the petitioner's inspection and copying of the medical records provided.

Date: _____

JUDGE DAVID D. EGAN
JUSTICE OF THE SUPREME COURT

Petitioner: Warren R. Follum, Sr.
P.O.Box 5774
Raleigh, N. C. 27650
919-522-5689

STATE OF NEW YORK,
SUPREME COURT COUNTY OF MONROE

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HONORABLE DAVID D. EGAN
SUPREME COURT JUSTICE

SUPREME COURT CHAMBERS
HALL OF JUSTICE
ROCHESTER, NEW YORK 14614 - 2186
TELEPHONE 585 - 428 2008
FAX 585 - 428 - 3550

January 23, 2004

Mr. Warren R. Follum, Sr.
Post Office Box 5774
Raleigh, North Carolina 27650

Re: Follum v. Follum

Dear Mr. Follum:

Enclosed please find the three original proposed Orders to Show Cause in the above referenced matter. Justice Egan has reviewed the merits of each of your applications and has declined to sign the orders at this time.

As you are already aware, the hearing of this matter is still scheduled for the date certain of February 23, 2004.

Sincerely,

"s/ Daniel P. Majchrzak, Jr."

Daniel P. Majchrzak, Jr.
Principal Law Clerk to Hon. David D. Egan